IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27/10/2003

Coram

The Honourable Mr.Justice A.S.VENKATACHALAMOORTHY
and
The Honourable Mr.Justice S.R.SINGHARAVELU

C.M.A.No.150 of 1997 and C.M.A.151 of 1997

C.M.A.No.150 of 1997

National Insurance Company Ltd.,
rep.by its Divisional Manager,
Pudukkottai ... Appellant

-Vs-

1. Rani
2. Minor Hebasiba
3. Minor Rameshkumar
4. P.Shanmugam ... Respondents

(Minor respondents 2 & 3 are rep.by
their natural guardian 1st respondent)

This Civil Miscellaneous Appeal has been preferred against the award of the learned IV Additional Subordinate Judge, Madurai in M.A.C.T. O.P.No.1109 of 1992 dated 22.4.1996.

C.M.A.No.151 of 1997

National Insurance Company Ltd.,
rep.by its Divisional Manager,
Pudukkottai ... Appellant

Vs.

1. S.Shanmugasundaram
2. P.Shanmugam ... Respondents

This Civil Miscellaneous Appeal has been preferred against the award of the learned IV Additional Subordinate Judge, Madurai in M.A.C.T. O.P.No.1112 of 1992 dated 22.4.1996.

!For Appellant : Ms.M.B.Surekha
for Mr.R.Vedantham

For Respondents : Mrs.Hema Sampath

:COMMON JUDGMENT

A.S.VENKATACHALAMOORTHY, J.

The above Civil Miscellaneous appeals have been filed by the National Insurance Company Limited, represented by its Divisional Manager, Pudukkottai against the common award dated 22.4.1996 and made in MACT.O.P.No.1109 of 1992 and MACT.O.P.No.1112 of 1992 on the file of Motor Accident Claims Tribunal (IV Addltional Subordinate Court), Madurai. Hence both the above appeals can be disposed of by this Common Judgment.

2. The husband of the first respondent in C.M.A.No.150 of 1997 by name Subramani along with the first respondent in C.M.A.No.151 of 199 7 by name Shanmugasundaram were proceeding by walk on 27.2.1991 at about 11.00 p.m. and when they reached the junction of new jail road and A.A. Road, the lorry owned by one Shanmugham (4th respondent and 2 nd respondent respectively in C.M.A.150 and 151 of 1997), driven in a rash and negligent manner came from north to south and dashed against the said two persons, in which the Subramani died on the spot, while the other person by name Shanmugasundaram sustained grievous injuries.

3. Pleading as above, the heirs of Subramani viz., wife and two children filed M.A.C.T.O.P.No.1109 of 1992 claiming compensation to the tune of Rs.5,00,000/-. The injured Shanmugasundaram filed M.A.C.T. O.P.No.1112 of 1992 claiming compensation to the tune of Rs.50,000/-.

4. The appellant herein viz., National Insurance Company Limited resisted the petitions contending that at the relevant time, the person who drove the lorry was one Murugan and he was not the original driver of the Lorry and in fact, he had no licence at all to drive the vehicle. It is also pleaded that inasmuch as the owner of the Lorry entrusted the lorry to an unlicensed person, in violation of the terms and conditions of the Insurance Policy, the Insurance Company is not liable to indemnify in respect of any liability arising out of the accident.

5. Without prejudice to the said contention, the Insurance Company also disputed the occupation and monthly income of the deceased Subramani and contended that the claim of Rs.5,00,000/- is highly excessive. The Insurance Company further contended that in any event, if at all the heirs of Subramani are entitled to any compensation, the same will have to be paid only by the owner of the lorry.

6. So far as the claim made in M.A.C.T.O.P.No.1112 of 1992 by the injured Shanmugasundaram, the Insurance Company raised the same defence as in the other petition and also disputed the age of the Claimant Shanmugasundaram, his income and medical expenses, etc.

7. Before the Tribunal both the parties let in oral and documentary evidence. After duly considering the materials available on record, the Tribunal came to the conclusion that the accident took place only because of the rash and negligent driving of the lorry and that further held that both Insurance Company as well as owner of the lorry are liable to pay the compensation. The Tribunal fixed the compensation amount as Rs.1,32,200/- and Rs.41,800/- respectively in M.A.C.T. O.P.Nos.1109 and 1112 of 1992.

8. Before this Court, the learned counsel appearing for the

appellant contended that the Insurance Company is not liable to pay the compensation since the lorry, at the relevant time, was not driven by its driver RW-1 and in fact, it was driven by RW-4, who was a mechanic, admittedly without a licence. According to the appellant, the Insured had committed specific breach of the provisions of the Motor Vehicles Act, in particular Section 147 and had also contravened the terms and conditions of the Policy, the contract of the insurance and as such the appellant cannot be saddled with liability for payment of compensation.

9. The learned counsel appearing for the owner of the lorry by name Shanmugam contended that he only handed over the lorry to the licenced driver viz., RW-1 and the said driver gave the vehicle to the mechanic RW-4 for repairs and only later on he was informed about this. Even according to him, RW-4 took the vehicle for test drive and the accident occurred at that time.

10. The learned counsel, who appeared for the Claimants in both the appeals contended that so far as they are concerned, simply because the vehicle was driven by the person (RW-4), who had no valid driving licence, that would not absolve the Insurance Company of its liability and it is settled legal position as could be seen from various rulings of the Supreme Court. The learned counsel further contended that what has been awarded by the Tribunal in both the appeals by way of compensation is alarmingly low and that this Court may consider enhancing the compensation notwithstanding the fact that the Claimants have not filed any appeal or cross objection. According to the learned counsel, this Court has got ample powers to enhance the compensation invoking its powers conferred under Order XLI Rule 33 of Code of Civil Procedure. It is further submitted that in appropriate cases this Court has been taking consistent view that the Court can invoke the provisions of Order XLI Rule 33 and enhance the compensation. The learned counsel repeatedly and strenuously argued that in cases of this nature, it is the duty of the Court to award just compensation and the fact that the Claimants have not filed cross objection or independent appeal may not stand in the way of rendering justice.

11. That the accident took place only due to the rash and negligent driving of the lorry in question by RW-4 mechanic, to whom the lorry was entrusted for repairs by RW-1, the regular driver of the lorry, has not been disputed.

12. Let us proceed to consider the main contention put forward by the appellant/Insurance Company. The learned counsel for the appellant submitted that RW-1 is the regular driver of the lorry owned by RW-2. According to them, the lorry was entrusted to RW-4 mechanic, who after carrying out repairs, took the lorry for test driving and it was at that time the accident occurred. The said mechanic admittedly had no driving licence at the relevant time. Hence, according to the learned counsel, as per the terms and conditions of the Policy, the Insurance Company is not liable to pay the compensation.

13. On the other hand, the learned counsel appearing for the Claimants contended that in view of the recent rulings of the Supreme Court, it will not be open for the Insurance Company to contend as above and its liability continues to be there so long as there is valid Policy as against the third parties.

14. There is no dispute between the parties that the vehicle

viz., the lorry was entrusted by the regular driver RW-1 to the mechanic RW-4, who after carrying out the repairs, took the lorry for a test drive and at that time the accident occurred. Equally there is no dispute that the mechanic was not having valid licence at the relevant time. Of course, in the Policy, it is stated that any person including the insured could drive, provided such a person holds an effective driving licence at the time of accident and is not disqualified from holding or obtaining of such licence. In such a situation, the Supreme Court has laid down that the Insurance Company is liable to innocent third party, but the only thing is it should recover the amount from the insured (vide 2001(4) SCC 342 (New India Assurance Co., Shimla v. Kamla and Others); I(2003) ACC 611 (United India Insurance Company Ltd., v. Lehru & Ors.)). Hence, we have no difficulty in rejecting this contention of the Insurance Company. Now that the owner of the vehicle is also before the Court, we make it clear that the Insurance Company, after paying the compensation amount to the Claimants, can recover the same from the owner of the vehicle.

15. What remains to be considered is, whether the Claimants are entitled for more compensation and if the answer is in the affirmative, whether enhancement can be ordered invoking Order XLI Rule 33, since the Claimants have not filed any appeal or Cross Objection.

16. At the risk of repetition it may be stated that the contention put forward is that the Court is duty bound to fix the just compensation. The fact that the Claimants have not filed any cross objection would not stand in the way and further the Court can by invoking the powers conferred under Order XLI Rule 33 of CPC, if satisfied, can enhance the compensation and call upon the Claimants to pay necessary Court fee. In that context, the learned counsel also submitted, when the Supreme Court has ruled that even at the appellate Stage original petition can be amended claiming enhanced compensation, the Court enhancing compensation in the instant case, if satisfied, invoking powers under Order XLI, Rule 33 will certainly be in order.

17. Per contra, the learned counsel appearing for the Insurance Company so also the owner of the lorry contended that the powers conferred under Order XLI, Rule 33 can be invoked only in exceptional circumstances and the Claimants having not filed any cross objection for several years, which would only show that they are satisfied with the award, cannot request the Court to invoke its powers, which has to be done only in rare cases and subject to certain limitations.

18. Section 168 of the Motor Vehicles Act, 1988 is to the effect that on receipt of application for compensation made under Section 166 , the Tribunal shall after giving notice and hearing all the parties, hold an enquiry and make an award, which appears to it to be just. This section corresponds to Section 110-B of the Motor Vehicles Act, 1939. The Tribunal while computing compensatio n under Section 168 of 1988 Act, has a wide discretion than what it had under the Fatal Accidents Act of 1855. The provisions of 1988 Act are clearly beneficiary legislation and hence to be interpreted in a way which confers benefit or usurp benefits.

19. At this juncture, it has to be pointed out that it is difficult to compensate in money for pain and for consequences, but there is no other device.

(a) Quoting the exact words of Lord Morris in Parry vs.

Cleaver, 19 69(1) All E.R. 555, would be more apt,
"The only compensation which the appellant can receive from the respondent and the only compensation which he seeks and claims is compensation in money. .... To compensate in money for pain and for physical consequences is invariably difficult but it is recognised that no other process can be devised than that of making a monetary assessment. No sort of arithmetical calculation is possible. Money cannot really compensate for the loss of a limb or for any permanent deprivation of physical abilities or indeed for pain and suffering. There can be no equation between purchasing power and those things which cannot be purchased. But a money award is all that is possible.
.....
In my view, the general principle and the general approach in calculating monetary loss in a case such as the present is that an injured person should receive such an amount of money as will put him in the same position as he would have been in if he had not received the injuries (see British Transport Commission v. Gourley (1955)3 All E.R. 7 96)."
(Emphasis supplied)

(b) One other aspect to be remembered is that the assessment of damages has never been an exact science; it is essentially practical as ruled in 1963 (2) Q.B. 683 (Charterhouse Credit Co. Ltd. v. Tolly).
(c) Similarly, the Supreme Court has ruled in (1999) 4 SCC 22 (Ashwani Kumar Mishra v. P.Muniam Babu and others) and AIR 1995 SC 755 (R.D.Hattangadi v. Pest Control India Pvt. Ltd.) that whenever a Court is required to fix in cases of accident, it involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of disability caused and that all such elements are required to be viewed with objective standards. The Court also ruled that the Court cannot base its opinion merely on speculation.
(d) In fact, in yet another ruling, the Supreme Court held that the Court must take a reasonably liberal view in fixing the compensation (Refer: AIR 1994 SC 1, G.M.Kerala State Road Transport Corporation v. Susamma Thomas).

20. We also turned to Words and Phrases, edited by West Publishing Company, Vol.23, where we find the word 'just' is described as under,
"The word 'Just' is derived from the Latin justus, which is from the Latin jus, which means a right and more technically a legal right-a law. Thus 'jus dicere' was to pronounce the judgment; to give the legal decision. The word 'just' is defined by the Centrury Standard Dictionary as right in law or ethics and in Standard Dictionary as conforming to the requirements of right or of positive law, in Anderson's Law Dictionary as probable, reasonable, Kinney's Law Dictionary defines "Just" as fair, adequate, reasonable, probable; and justa cause as a just cause, a lawful ground. Vide Bregman v. Kress, 81 N.Y.S. 107 2, 1073, 83 App.Div.I."

Black's Law Dictionary would give the meaning of the word "just" as legally right; lawful; equitable.
Webster's Dictionary of the English Language Unabridged explains the word "just" as equitable; impartial; fair; exact; accurate;

neither too much nor too little; neither more nor less; right; proper.
21. The recent ruling of the Supreme Court reported in 2003 AIR SCW 3797 (The Divisional Controller, K.S.R.T.C. V. Mahadeva Shetty and another) gives a note of caution observing as under,
"Statutory provisions clearly indicate that compensation must be ' Just' and it cannot be a bonanza; not a source of profit but the same should not be a pittance. The Courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be 'just' compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of 'just' compensation which is the pivotal consideration. Though by use of the expression 'which appears to it to be just' a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression 'just' denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so, it cannot be just. ..."

In the same ruling i.e., the one reported in 2003 AIR SCW 3797, the Supreme Court explained the word "Compensation" as under,
"... 'Compensation' means anything given to make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay: it need not, therefore, necessarily be in terms of money, because law may specify principles on which and manner in which compensation is to be determined and given. Compensation is an act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may, receive equal value for his loss; or be made whole in respect of his injury; something given or obtained as equivalent; rendering of equivalent in value or amount; an equivalent given for property taken or for an injury done to another; a recompense in value; a recompense given for a thing received; recompense for whole injury suffered; remuneration or satisfaction for injury or damage of every description. The expression ' compensation' is not ordinarily used as an equivalent to 'damages', although compensation may often have to be measured by the same rule as damages in an action for a breach. The term 'compensation' as pointed out in the Oxford Dictionary signifies that which is given in recompense, an equivalent rendered; 'damages' on the other hand constitute the sum of money, claimed or adjudged to be paid in compensation for loss or injury sustained. 'Compensation' is a return for a loss or damages sustained. Justice requires that it should be equal in value, although not alike in kind."

22. Keeping the above principles and rulings in mind, let us proceed to consider whether the compensation fixed by the Tribunal is just and proper.
23. With reference to C.M.A.150 of 1997, the Claimants are wife and two minor children. The deceased was at the relevant time aged about 27 years old and he was getting an income of Rs.1,200/- per month. After

deducting 1/3rd, if the remaining amount of Rs.800/- is multiplied by 12, the yearly contribution comes to Rs.9,600/-. If this is multiplied by 18, a figure of Rs.1,72,800/- can be arrived. With this, if a sum of Rs.20,000/- towards love and affection, another sum of Rs.10,000/- towards loss of consortium and Rs.5,000/- for funeral expenses are added we can arrive at a figure of Rs.2,07,800/-, which in our opinion is the just compensation payable to the Claimants. Whereas, the Tribunal has fixed only a sum of Rs.1,32,200/-.

24. In C.M.A.No.151 of 1997, the first respondent/Claimant has sustained two fractures on both the legs and the extent of disability has been fixed at 25%. The Doctor, who treated the Claimant has also deposed before the Court that the length of the left leg is shortened by 2 Cms. and there is also restriction in the movement of both the ankles and it would not be possible for him to sit on the floor. He has also testified before the Court that the victim would not be able to stand for a long. In these peculiar facts and circumstances, we are of the view that the victim must be awarded at least Rs.35,000/- towards permanent partial disability. Apart from this, he must be given another Rs.10,000/- towards pain and sufferings since he has undergone surgery and another Rs.10,000/- towards medical expenses, extra nourishment and transportation charges. Thus in all, Rs.55,000/- would be the just and proper compensation for the claimant Shanmugasundaram in C.M.A.No.151 of 1997, whereas the Tribunal has awarded only a sum of Rs.41,800/-.

25. But the question arises whether in the absence of cross objection, this Court can invoke Order XLI, Rule 33 of Code of Civil Procedure and enhance the compensation and call upon the Claimants to pay necessary Court fee.

26. Order XLI, Rule 33 of Code of Civil Procedure reads as under,

"O.XLI, R.33 – Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross suits or where two or more decrees are, passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:
Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

27. (a) In 1964(3) SCR 549 (Rameshwar Prasad and others v. M/s Shyam Beharilal Jagannath and others), a bench consisting of three judges of Supreme Court, pointed out the scope of Order XLI, Rule 33, in the following terms:

"... It empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or Order in so far

as it affects the rights of the appellant. It further empowers the Appellate Court to pass or make such further or other decree or Order as the case may require. The Court is thus given wide discretion to pass such decrees and Orders as the interest of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties. ..."
(emphasis supplied)

(b) The next ruling that can be referred to is reported in
(1965) 3 SCR 550 (Nirmala Bdla Ghose and another v. Balai Chand Ghose and another). Here again, a Bench consisting of three Judges of Supreme Court pointed out that though the terms employed are wide, the same have to be applied with discretion and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. The Court in that case observed as under,
"Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by O.41, Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from." (Emphasis supplied)
What has to be noted is that the Supreme Court made it clear that the rule does not confer an unrestricted right to re-open decrees, which have become final.
(c) Then we have the ruling reported in (1975) 1 SCC 212
(Harihar Prasad Singh and others v. Balmiki Prasad Singh and others), where the Court pointed out that a party who is aggrieved by a decree, to escape from its operation, file an appeal and where he fails to do so, no relief should ordinarily be given under O.XLI, Rule 33. Of course, the Court pointed out three exceptions by way of illustrations. Let us proceed to quote the relevant portion, which is as under,
"But there are well-recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory. ..." (Emphasis supplied)

(d) Then we have the ruling reported in AIR 1988 SC 54 (Mahant Dhangir and another v. Shri Madan Mohan and others). In that decision, the Court took the view that the rule itself is liberal enough and that to invoke the said rule, only two requirements are to be satisfied. Firstly, the parties before the lower court should be there before the appellate Court and

secondly, the question raised must properly arise out of judgment of the lower Court. In paragraph 12 of the said Judgment, the Supreme Court has referred the ruling reported in 1964 (1) SCR 980 (Panna Lal v. State of Bombay). It has to be noted that the rulings of the Supreme Court reported in 1964 (3) SCR 549; 1965 (3) SCR 550; and 1975 (1) SCC 212 (all cited supra) were not brought to the notice of the Court.

(e) The next ruling is reported in (1998) 8 SCC 222 (State of Punjab and others v. Bakshish Singh). Paragraphs 8 and 9 are relevant, which we quote hereunder in extenso.

"8. This provision gives very wide power to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or crossobjections.

9. The discretion, however, has to be exercised with care and caution and that too in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot, in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case." (Emphasis supplied)

Here again, it has to be noted that such a power must be exercised in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for.

(f) Finally we have a very recent judgment to be mentioned, which is reported in 2003 (3) Law Weekly 721 (Banarsi and others. v. Ram Phal). The Supreme Court, after considering various rulings referred by us above, so also some more rulings, has laid down the law as under,

"Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate Court may still direct passing of such decree or making of such order which ought to have been passed or made by the Court below in accordance with the findings of fact and law arrived at by the Court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate Court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate Court. The object sought to be achieved by conferment of such power on the appellate Court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care in discretion while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the

portion of the decree held liable to be set aside or interfered by the appellate Court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage or a person not a party before the Court, secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the Appellate Court exercising power under Rule 33 of O.41." (Emphasis supplied)

It has to be noted that the Supreme Court considered the ruling reported in (1964) 1 SCR 980 (cited supra). In fact in that ruling itself the Supreme Court held that the facts of that case was similar to the illustrations given in the code.

28. Let us take an example. A person dies in a road accident, leaving a minor son and an unmarried daughter of 18 years. A claim is made for Rs.6,00,000/- under the Motor Vehicles Act. The Tribunal awards Rs.2,00,000/-, to be shared among the claimants equally. The respondents in the O.P. files an appeal, questioning the award of Rs.2,00,000/-. The unmarried daughter alone files a cross objection. The Court comes to the conclusion that the just compensation has to be fixed at Rs.4,00,000/-, in which case the Court, even though the minor son represented by the next friend has not filed any cross objection, can invoke Order-41 Rule-33, holding that the minor son will also be entitled for the enhanced compensation ie., Rs.1,00,000/-.

29. Coming to the Land Acquisition Act, take a case where a joint family consisting of father and two sons own three acres of land and the same is acquired by the Government and the Reference Court fixes the compensation payable at Rs.3,00,000/-, obviously to be shared among them in the ratio 1:1:1. Questioning this, the State files an appeal. The father and one son alone file cross objection but not the other son. The High Court, in appeal, comes to the conclusion that the value of the land has to be fixed at Rs.4,50,000/-. In such a case, even though one son has not filed cross objection, the Court can, invoking Order-41 Rule-33, hold that he will also be entitled for the enhanced compensation.

30. It has to be noted that in both the above cases, invoking Order-41 Rule-33 will not be inconsistent with the findings of the appellate court and that further this will avoid inequality in the relief granted to similarly placed parties.

31. Learned counsel appearing for the claimants would contend that a learned single Judge of this Court in Managing Director, Thanthai Periyar Transport Corporation, Villupuram v. Sundari Ammal and four others (1999 (II) CTC 560) has considered various rulings including the one reported in 1998 (8) SCC 222 (cited supra) and has held that the Court has got wide power to do complete justice between the parties and by invoking Order-41 Rule-33 CPC., Court can

award enhanced compensation even without cross objection.
32. We may point out that the learned single Judge, though referred to the ruling reported in 1998 (8) SCC 222 (cited supra), has not rather noticed that in para No.9 of the said Ruling, the Supreme Court has pointed out as to what it meant by rare cases ie., where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. Hence, we do not find any substance in the submission made by the learned counsel for the claimants.
33. The learned counsel appearing for the insured would draw the attention of this Court to the ruling reported in 2002 (8) Supreme 497 = 2003 (2) SCC 274 (Nagappa v. Gurudayal Singh and others) where the Supreme Court has ruled that 'the Court is required to determine the just compensation and there is no other limit ation or restriction for awarding such compensation and in appropriate cases where from the evidence brought on record if the Tribunal/Court considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such award' and submits that the said ruling would empower the Court to enhance the compensation at the appellate stage even without the injured filing an appeal or cross objection. The counsel would further contend that the ruling reported in 2003 AIR SCW 1494 (Banarsi and others. v. Ram Phal) would not stand in the way for two reasons, (1) the ruling in Nagappa's case is by a three Judge Bench and (2) the subsequent ruling by two judges Bench in Banarsi's case has not considered the ruling in Nagappa's case.
34. All that the Supreme Court held in Nagappa's case is that the Tribunal or the Court can award more compensation than the one that has been claimed in appropriate cases. In Banarsi's case, the Supreme Court ruled that the Court can exercise its powers under Order 41 Rule 33 of Code of Civil Procedure and the same is subject to at least three limitations. The Court also pointed out that the same has to be consistent with the findings of the appellate Court and to be invoked to set right the neglected among similarly placed persons.

35. The legal position can be summed up as under:-
(i) The power conferred under Order XLI Rule-33 to the Appellate Court is a very wide power to do complete justice, but however, discretion to use such power is to be exercised judiciously with care and caution and only in rare cases.
(ii) The nature of power conferred under Order XLI Rule 33 has been explained by the Supreme Court in the rulings reported in 2003 (3) Law Weekly 721 and 1998 (8) SCC 222 (both cited supra).
The provision confers power of widest amplitude on the appellate Court so as to do complete justice between the parties. The power is subject to at least three limitations.
Firstly, the power cannot be exercised to the prejudice or disadvantage or a person not a party before the Court. Secondly, a claim given up or lost cannot be revived. Thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party.
The Court can invoke such power provided it is consistent with the findings arrived at by the appellate court and that the same would remove the

inconsistencies, inequities or inequalities in reliefs granted to similarly placed parties.
The ruling reported in 1999 (II) CTC 560 (Cited supra) does not set out the correct legal position and hence it is no more a good law.

36. Coming to the present case, there is no difficulty to hold that this is not a case, where this Court can invoke Order XLI Rule 33 and enhance the amount of compensation.

37. In this view of the matter, the above appeals are dismissed. No costs.

vr

To

IV Additional Subordinate Judge, Madurai